

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

ORIGINAL

74-1498

B
P/S

To be argued by
ANTHONY J. McNULTY

United States Court of Appeals
FOR THE SECOND CIRCUIT

JAMES V. McLEAN, ETHEL McLEAN, JOSEPH LINFANTE
and SUSAN LINFANT, *Plaintiffs-Appellees,*
against
L.P.W. REALTY COMPANY, LAWRENCE PAUL WOLF,
Defendants,
GULF OIL CORPORATION,
Defendant-Appellant,
JOSEPH JAMES, INC., and JOSEPH JAMES,
Defendants-Appellees-Appellants.

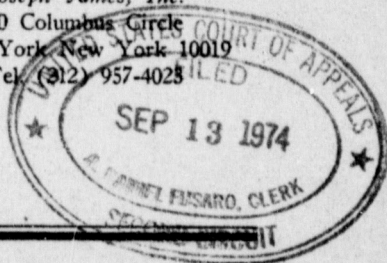
GULF OIL CORPORATION,
Third-Party Plaintiff-Appellant-Appellee,
against
BEAMAN CORPORATION,
Third-Party Defendant-Appellant,
and
UNITED PORCELAIN CO., INC.,
Third-Party Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF FOR DEFENDANT-APPELLEE,
JOSEPH JAMES, INC.**

A. ALLEN STANGER
Attorney for Defendant-Appellee,
Joseph James, Inc.
10 Columbus Circle
New York, New York 10019
Tel. (212) 957-4023

WILLIAM F. McNULTY
ANTHONY J. McNULTY
Of Counsel



INDEX

	PAGE
Introduction	1
Questions Presented	4
FIRST POINT—The District Court properly dismissed Gulf's cross-complaint against James for con- tractual indemnity	4
Conclusion	9

CASES CITED

<i>Levine v. Shell Oil Company</i> , 28 N.Y. 2d 205	6
<i>Redding v. Gulf Oil Corporation</i> , 38 A.D. 2d 850	7
<i>Goodman v. Imperion Manor</i> , 62 Misc. 2d 561, affd 64 Misc. 2d 813 (App. Tm., 2d Dept.)	7, 8
<i>Lustig v. Cong. B'Nai Israel</i> , 65 Misc. 2d 1052	6, 8
<i>Hershowitz v. Menorah Caterers</i> , 72 Misc. 2d 199	7
614 <i>Third Avenue Corp. v. Grand Union Works Inc.</i> , 44 A. D. 2d 531	8

STATUTES CITED

General Obligations Law

Section 5-321	6, 8
“ 5-322	6

United States Court of Appeals

FOR THE SECOND CIRCUIT

JAMES V. McLEAN, ETHEL McLEAN, JOSEPH LINFANTE
and SUSAN LINFANT,

Plaintiffs-Appellees,

against

L.P.W. REALTY COMPANY, LAWRENCE PAUL WOLF,

Defendants,

GULF OIL CORPORATION,

Defendant-Appellant,

JOSEPH JAMES, INC., and JOSEPH JAMES,

Defendants-Appellees-Appellants.

GULF OIL CORPORATION,

Third-Party Plaintiff-Appellant-Appellee,

against

BEAMAN CORPORATION,

Third-Party Defendant-Appellant,

and

UNITED PORCELAIN CO., INC.,

Third-Party Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE, JOSEPH JAMES, INC.

Introduction

This is an appeal by the Third-Party Defendant-Appellant, Beaman Corporation (hereinafter designated "Beaman"), the general contractor for the construction of a decorative porcelain facing and overhang containing light-

ing fixtures on a Gulf service station on upper Eighth Avenue in the Borough of Manhattan, a portion of which collapsed and fell while the plaintiffs, James McLean and Joseph Linfante, workm n erecting the overhang, were working on it putting in the lighting fixtures on the afternoon of June 28, 1966. The facts leading up to and surrounding the occurrence of the accident are set forth in the memorandum and supplemental opinion of the District Court below (801a-810a) and in the brief of the Third-Party Defendant-Appellant, Beaman (pp. 2-15).

The plaintiffs commenced negligence actions to recover damages for their personal injuries against the defendants, L.P.W. Realty Company and Lawrence Paul Wolf, the owners of the premises; against Gulf Oil Corporation (hereinafter designated 'Gulf'), the lessee of said owners, who retained the architect that planned the job, and also against the defendants, Joseph James, Inc., and Joseph James (hereinafter designated "James"), the sub-lessee of Gulf, who occupied and operated the gas station under a service station lease with Gulf, containing an indemnity agreement in favor of Gulf, James' landlord (Ptf's Exh. 4, Exh. Vol., pp. 1-3). At the pre-trial conference herein, the plaintiffs' actions against Lawrence Paul Wolf and Joseph James were discontinued with prejudice (64a).

In its answer Gulf cross-claimed against James for contractual indemnification, based upon the indemnity agreement in the sub-lease, in the event Gulf was held liable to the plaintiffs in the main action (which it was), and also on the theory of common law indemnification (18a-23a). Gulf also brought a third-party action against the Third-Party Defendant-Appellant, Beaman, for contractual and common-law indemnity and against United Porcelain Co., Inc. (hereinafter designated "United Porcelain"), its own subcontractor that employed the plaintiffs who performed the work, alleging that their contributory negligence and the negligence of their employer caused the accident (33a-37a).

James cross-claimed against Gulf, Beaman and United Porcelain (52a-54a).

Federal jurisdiction is based upon diversity of citizenship.

The case came on for trial before Hon. Whitman Knapp, and a jury in the United States District Court for the Southern District of New York and resulted in the entry of a judgment upon a jury verdict in the sum of \$90,800.00, including interest, in favor of the plaintiffs and their respective wives, against Gulf, which was given full contractual indemnity over against Beaman by the Court, as well as 50% common-law indemnity against Beaman (826a-827a). In addition, the third-party and cross-complaints of Gulf and Beaman against United Porcelain were dismissed by the Court (827a-828a). At the trial District Judge Knapp granted the motion of James to dismiss the plaintiffs' causes of action against him for negligence on the ground of legal insufficiency and the Court also dismissed Gulf's contractual and common-law indemnity cross-claims against James (610a-616a, 667a, 827a).

Beaman appeals from the amended judgment entered on June 28, 1974, against it in the office of the Clerk of the United States District Court for the Southern District of New York.

The brief of both Beaman and Gulf challenge the dismissal on the merits of Gulf's cross-claim against James for contractual indemnity, although it is very difficult to understand how Beaman, who was not a party to the lease containing the indemnity agreement and could not be considered a third-party beneficiary thereunder, is now legally "aggrieved" by said dismissal.

Question Presented

The sole question respecting James raised by this appeal is:

1. Did the District Court err in finding that the provisions of the indemnity agreement between Gulf and James were against public policy as violative of Section 5-321 of the General Obligations Law?

The Court below impliedly answered this question in the negative (615a-616a, 667a).

FIRST POINT

The District Court properly dismissed Gulf's cross-complaint against James for contractual indemnity.

The indemnity agreement between Gulf and James is paragraph "7" in the lease between these co-defendants, which has been marked Plaintiffs' Exhibit 4 (Exh. Vol., pp.1-3). It is also reproduced in the Joint Appendix as part of Gulf's answer on page 19a and on page 7 of Gulf's brief.

Although the District Court herein did not specifically refer to Section 5-321 of the General Obligations Law, it is clear from the record that the principle of unconscionability in enforcing this indemnity agreement between Gulf and James was the ground for his refusal to give Gulf judgment over against James (615a-616a):

"MR. FUREY: James is in on the indemnity agreement.

THE COURT: I don't think so. Let me read it. Where is it? This is the damnest indemnity agreement I heard of. But that wouldn't be the plaintiffs' case. I would still be entitled to dismiss it on the plaintiffs' case, indemnity agreement or not.

MR. FUREY: Then he would remain as a third party defendant under the indemnity agreement.

THE COURT: Let me read it. Because if it shows it in this I want to show it to my former partner, because it is a honey.

MR. FUREY: Can I read it now?

THE COURT: Show it to me. I have it in front of him.

MR. FUREY: Clause number seven, the agreement between Gulf Oil and Joseph James.

THE COURT: Unless you find me a case to the contrary, I would read that in view of the fact this is on Gulf Oil Corporation form, and in view of the fact that this lease is known and intended to be for the operation of a gas station, I will read that to except the situation in this case where Gulf without consulting the lessee went in and for its own purposes—what was the length of this lease?

MR. FUREY: The period of time, your Honor.

MR. BRILL: One year.

THE COURT: One year. I would not read that as covering the situation.

MR. FUREY: Has your Honor read the case of Levine against Schone? [sic]

THE COURT: I have, but it seems to me it has nothing to do with this situation. As I say, I may be in error, and that is why we have got three wise men up there to set me right, but I am not in doubt. But I will reserve decision if you bring a case saying that the plaintiff has a case against you. Obviously you have an interest under the Doyle case in keeping him [James] in."

The District Court subsequently granted James' motion to dismiss Gulf's cross-claim against it (667a).

It is the position of James on this appeal, as it was at the trial, that the indemnity agreement between itself and Gulf is void as against public policy in violation of Section

5-321 of the General Obligations Law, which reads:

“§ 5-321. Agreements exempting lessors from liability for negligence void and unenforceable

Every covenant, agreement or understanding in or in connection with or collateral to any lease of real property exempting the lessor from liability for damages for injuries to person or property caused by or resulting from the negligence of the lessor, his agents, servants or employees, in the operation or maintenance of the demised premises or the real property containing the demised premises shall be deemed to be void as against public policy and wholly unenforceable.”

Contrary to the contention in Gulf's brief that the case of *Levine v. Shell Oil Company*, 28 N.Y. 2d 205, “is on all fours with the case at bar” (Appellee's Br., p. 11), the decision in *Levine* expressly did not pass upon the “unconscionability” of contractual indemnity agreements of this type because the contract in *Levine*, under the circumstances of that case, was not shown to be “unconscionable” (*Levine, supra*, p. 213). Neither Gulf nor Beaman has been able to cite a case which specifically deals with the issue of whether or not the provisions of such an indemnity agreement should be enforced against a lessee under circumstances similar to those existing in the case at bar.

The companion statute to Section 5-321 of the General Obligations Law, Section 5-322, which makes “void” an indemnity agreement entered into with a “caterer or catering establishment” wherein the caterer exempts itself from liability for its own negligence”—which was added to the General Obligations Law in 1966—has been interpreted by lower court opinions in New York to cover liability for injuries sustained by a third-party guest who sues the caterer who, in turn, seeks indemnity from his client under a similar indemnity agreement and has not been limited solely to injuries sustained by the contracting in-

demnitor himself, as was the case of the injured lessee in *Redding v. Gulf Oil Corporation*, 38 A.D. 2d 850, cited on page 11 of Gulf's brief herein.

Goodman v. Imperion Manor, 62 Misc. 2d 561, affd.
64 Misc. 2d 813 (App. Tm., 2d Dept.);
Lustig v. Cong. B'Nai Israel, 65 Misc. 2d 1052.

As far as the *Redding* case is concerned, the issue before the Appellate Division in that case was the interpretation of the words "any person" in the indemnity agreement between the lessor and lessee and the court found that insofar as these words could encompass injury to the lessee-indemnitor, it would be in violation of Section 5-321 of the General Obligations Law to enforce the indemnity agreement against said lessee, who was himself injured as a result of the lessor's negligence (*Redding, supra*, p. 851). The remainder of the Court's opinion, which is *dicta*, that "*Levine* stands for the proposition that where a third party sues the landlord oil company for its active negligence, the tenant station operator may be required to respond under the indemnification clause" is no authority for the proposition that the station operator is required to respond in *all* cases.

Both the *Goodman* and *Lustig* cases were recently distinguished, although not overruled, by *Hershkowitz v. Menorah Caterers*, 72 Misc. 2d 199, the case cited on page 23 of Beaman's brief herein, on the ground that, as between the contracting caterers, who leased the premises and ran the affair, and the "catering hall", which was the lessor-indemnitee, the statute was not applicable because these two defendants "must be deemed to have contracted with each other on a more sophisticated commercial level, at arm's length and as equal contracting parties" (*Hershkowitz, supra*, p. 201).

If the same reasoning is sought to be applied to the indemnity agreement between Gulf and James in their lease in the case at bar, it need only be noted that paragraph 4(d) of said lease prevents the lessee from making any repairs or alterations to the premises, "except on prior written consent of Lessor" (Ptf's Exh. 4). It is undisputed that in the case at bar Gulf, not James, entered into the contract with Beaman for the performance of the work involved in the accident and actually hired the architect who formulated the work plans and that Gulf thereafter exercised control over the work. There is no evidence in the record that James had anything to do with the planning, supervision or performance of this job. It is submitted that, under these circumstances, an agreement by James to indemnify Gulf for Gulf's own negligence in the manner in which this project was planned or carried out or because of a dangerous condition on the roof where the workmen were to perform the work, of which James had no notice, would, under the terms of the lease giving Gulf sole authority to make such repairs or improvements, constitute an unconscionable result and would therefore place the terms of James' contractual indemnity agreement with Gulf under the prohibition of Section 5-321 of the General Obligations Law.

The case of *614 Third Avenue Corp. v. Grand Iron Works Inc.*, 44 A.D.2d 531, dealt with subrogation rights under policies of liability insurance involving an owner and a contractor and possible waiver of those rights, which, it is submitted, is quite different from the situation presented in the case at bar where a lessor oil company seeks to enforce against its own service station operator under their lease an agreement under which the operator "agrees to exonerate" the oil company from the consequences of its own negligence in the maintenance and repair of the station and the making of improvements, over which it has exercised control but over which the lessee has not exer-

cised control. It is submitted that, unless the language of Section 5-321 of the General Obligations Law is to be rendered meaningless, it should be applied to cover a situation such as presented in the case at bar and should therefore serve to "void" the indemnification agreement sought to be enforced by Gulf against James.

CONCLUSION

The dismissal of Gulf's cross-claim against James for contractual indemnity should not be disturbed.

Dated: New York, New York, September 11, 1974.

Respectfully submitted,

A. ALLEN STANGER,
*Attorney for Defendant-
Appellee, Joseph James, Inc.*

WILLIAM F. McNULTY
ANTHONY J. McNULTY,
Of Counsel

United States Court of Appeals for the Second Circuit

James V. McLean, Ethel McLean, Joseph Linfante and Susan Linfante,
Plaintiffs-Appellees,

against

L.P. W. Realty Company, Lawrence Paul Wolf, Defendants,
Gulf Oil Corporation, Defendant-Appellant,
Joseph James, Inc and Joseph James, Defendants-Appellees Appellants

Gulf Oil Corporation, Thid-Party Plaintiff-Appellant-Appellee,
against

Beaman Corporation, Third-Party Defendant-Appellant,
and United Porcelain Co., Inc., Third Party Defendant-Appellee

State of New York, County of New York, ss.:

Bernard S. Greenberg
agent for A. Allen Stanger

, being duly sworn deposes and says that he is
 the attorney

for the above named **Defendant-Appellee Joseph James, Inc.** ^{herein} That he is over
 21 years of age, is not a party to the action and resides at **162 East 7th**
Street, New York, N.Y.

That on the **13th** day of **September**, 19 **74** he served the within
Brief for Appellee James, Inc.

upon the attorneys for the parties and at the addresses as specified below

Furey & Mooney,
Attorneys for Defendant-Appellant and Third Party Plaintiff-
Appellant-Appellee, Gulf Oil Corporation,
600 Front Street, Hempstead, N.Y. 11550

Berman & Frost,
Attorneys for Plaintiffs-Appellees,
77 Water Street, New York, N.Y. 10005

Alexander, Ash, Schwartz & Cohen,
Attorneys for Thid Party Defendant-Appellee United Porcelain Co., Inc
801 Second Avenue,
New York, N.Y.

by depositing **three true copies**

to each of the same securely enclosed in a post-paid wrapper in the Post Office regularly maintained by the United States Government at

90 Church Street, New York, New York

directed to the said attorneys for the parties as listed above at the addresses aforementioned, that being the addresses within the state designated by them for that purpose, or the places where they then kept offices between which places there then was and now is a regular communication by mail.

Sworn to before me, this **13th**

day of **September**, 19**74**

Roland W. Johnson
ROLAND W. JOHNSON
Notary Public, State of New York
No. 4809703
Qualified in Rensselaer County
Commission Expires March 30, 1975

Bernard J. Kearney